Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1997

KEVIN M. KIRLIN,

Petitioner,

v.

IOWA SUPREME COURT BOARD OF PROFESSIONAL ETHICS & CONDUCT,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Iowa

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Kevin M. Kirlin is an Iowa attorney who placed advertisements and listings in the Yellow Pages of the U.S. West telephone directories for Des Moines. The Iowa Supreme Court Board of Professional Ethics & Conduct subsequently alleged that Kirlin violated rules governing lawyer advertising promulgated by the Supreme Court of Iowa by failing to certify his eligibility to list specific "fields of practice" prior to publication of the November 1994 Directory; by listing a field of practice in the November 1994 Directory which was not approved by the Supreme Court of Iowa; by failing to certify his eligibility to list all of the fields of practice listed in his advertisements in the November 1995 Directory; by failing to use an additional disclaimer in connection with listing professional affiliations in his advertisements in the 1994 and 1995 directories. The Supreme Court of Iowa found that the above conduct violated its lawyer advertising rules. Kirlin contended that the lawyer advertising rules in question impermissibly restricted his communications with prospective clients in violation of the First and Fourteenth Amendments to the United States Constitution. The Supreme Court of Iowa rejected that argument and publicly reprimanded Kirlin.

The question presented here is whether the Iowa lawyer advertising rules restricting the description of fields of practice, imposing practice and training requirements on lawyers who wish to identify approved fields of practice in their advertising, and requiring the use of multiple disclaimers are unconstitutional restrictions prohibited by the First and Fourteenth Amendments to the United States Constitution.

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PETITION FOR WRIT OF CERTIORARI

Kevin M. Kirlin respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Iowa entered in this proceeding on November 26, 1997, in order to determine whether the provisions of state law in question violate Kirlin's rights as secured by the First and Fourteenth Amendments to the United States Constitution.

OPINION BELOW

The opinion of the Supreme Court of Iowa that gives rise to this petition is reported at 570 N.W.2d 643 (Iowa 1997) and is set forth in the Appendix filed herewith beginning at page App. 1.

JURISDICTION

The opinion of the Supreme Court of Iowa that gives rise to this petition is a final judgment or decree rendered by the highest court of the State of Iowa in which the validity of a provision of state law is drawn into question on the ground of its being repugnant to the United States Constitution or where a right is claimed under the federal constitution. Furthermore, the Supreme Court of Iowa in this action has decided an important federal question in a way that conflicts with relevant decisions of this Court. Accordingly, the jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a) and Supreme Court Rule 10(c). Pursuant to Supreme Court Rule 13.1, this petition

has been filed within 90 days after entry of the final order or judgment filed herein by the Supreme Court of Iowa.

STATUTES AND RULES INVOLVED IN THIS CASE

DR 2-101 Publicity.

(A) Advertising in General. A lawyer shall not, on the lawyer's own behalf, or that of a partner, associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, use, or participate in the use of, any form of public communication which contains any false, fraudulent, misleading, deceptive, self-laudatory, or unfair statement, which contains any statement or claim relating to the quality of the lawyer's legal services, which appeals to the emotions, prejudices, likes, or dislikes of a person, or which contains any claim that is not verifiable. In all communications under DR 2-101 and DR 2-102, the lawyer may use restrained subjective characterizations of rates or fees such as "reasonable", "moderate", and "very reasonable", but shall avoid all unrestrained subjective characterizations of rates or fees, such as, but not limited to, "cut-rate", "lowest", "giveaway", "below-cost", "discount", and "special". All such communications shall contain the following disclosure: "The determination of the need for legal services and the choice of a lawyer are extremely important decisions and should not be based solely upon advertisements or self-proclaimed expertise. This disclosure is required by rule of the Supreme Court of Iowa."

* * *

(C) Content (informational). The following information shall be presumed to be informational and not solely promotional:

(1) Name, including name of law firm, names of professional associates, addresses, telephone numbers, and the designation "lawyer," "attorney," "law firm," or the like;

(2) Fields of practice, limitation of practice or specialization, but only to the extent permitted by DR 2-105;

(3) Date and place of birth;

(4) Date and place of admission to the bar of state and federal courts;

(5) Schools attended, with dates of graduation, degrees, and other scholastic distinctions;

(6) Public or quasi-public offices;

(7) Military service;

(8) Legal authorships;

(9) Legal teaching positions;

(10) Memberships, offices, and committee assignments in bar associations;

(11) Memberships and offices in legal fraternities and legal societies;

(12) Technical and professional licenses; and

(13) Memberships in scientific, technical, and professional associations and societies.

Nothing contained herein shall prohibit a lawyer from permitting the inclusion in reputable law lists and law directories intended primarily for the use of the legal professional of such information as traditionally has been included in these publications.

All such information shall be presented in a dignified manner.

If the publication of any of the foregoing items (1) through (13), inclusive, would indicate an area or field of practice such as, but not limited to, those set out in DR 2-105(A)(2), there shall be contained within such communication and contained in any electronic media communication the disclosure required by DR 2-101(A) and also a "notice to the public" in the following form:

> Memberships and offices in legal fraternities and legal societies, technical and professional licenses, and memberships in scientific, technical and professional associations and societies of law or field of practice do not mean that a lawyer is a specialist or expert in a field of law, nor do they mean that such lawyer is necessarily any more expert or competent than any other lawyer.
>
> All potential clients are urged to make their own independent investigation and evaluation of any lawyer being considered. This notice is required by rule of the Supreme Court of Iowa.

DR 2-105 Description and Limitation of Practice.

(A) A lawyer may be identified as practicing in or limiting practice to certain fields of law as follows:

(1) A lawyer admitted to practice before the United States Patent and Trademark Office may use the designation "Patents", "Patent Attorney", "Patent Lawyer", or "Registered Patent Attorney" or any combination of those terms, on the lawyer's professional card, letterhead, office sign, professional notice or announcement, all as otherwise allowed by DR 2-102(A), and in newspapers, periodicals, telephone

directory listings, and legal directories, as otherwise allowed by DR 2-101(B).

In addition to use of the designation "Patents", "Patent Attorney", "Patent Lawyer", and "Registered Patent Attorney", a lawyer admitted to practice before the United States Patent and Trademark Office may use the designation "Trademarks", "Trademarks and Copyright Law", "Trademark Attorney", "Trademark Lawyer", or any combination of those terms on the lawyer's professional card, letterhead, office sign, and professional notice or announcement, all as otherwise allowed by DR 2-102(A), and in newspapers, periodicals, telephone directory listings, and legal directories as otherwise allowed by DR 2-101(B), provided the lawyer satisfies the eligibility requirements of DR 2-105(A)(4) in any one of the fields of practice of "Patents", "Trademarks", or "Copyright Law" or combination thereof.

(2) An individual lawyer who, in fact, limits practice to certain fields of law or who is limiting practice primarily to certain fields of law, and who satisfies the eligibility requirements of DR 2-105(A)(4), may indicate such limitation or description of practice by listing, in the manner provided by DR 2-105(A)(3), not more than three of the following fields of law practice in any communication otherwise allowed by DR 2-102(A) and DR 2-101(B):

Administrative Law
Admiralty Law
Adoption Law
Alternate Dispute Resolution
Antitrust and Trade Regulation
Appeals

Banking
Commercial and Retail Collections
Constitutional Law
Construction Law
Corporation and Business Law
Criminal Law
Debt and Bankruptcy Law
Discrimination and Civil Rights Law
Domestic Relations and Family Law
Employment Law
Environmental Law
Health Law
Immigration Law
Insurance Law
International and Foreign Law
International Trade and Investment
Labor Law
Malpractice or Professional Negligence
Military Law
Municipal Law
Pension and Profit Sharing Law
Personal Injury Law
Product Liability Law
Public Utility Law
Real Estate Law
Securities Law
Social Security Disability
Taxation Law
Trademarks and Copyright Law
Trial Law
Wills, Estate, and Probate Law
Workers' Compensation Law.

The Iowa Supreme Court Board of Professional Ethics and Conduct, acting as commissioners of the supreme court as provided by court rule 118, on its own motion or upon the request of a lawyer admitted to practice in this state, shall

from time to time, consider and recommend to the court proposed amendments to these rules expanding or restricting the permitted list of fields of law practice.

(3) Description or indication of limitation of practice permitted by DR 2-105(A)(2) shall be only in the following manner.

(a) If the lawyer accepts only legal matters in that lawyer's listed fields of law practice, such listing of fields of law practice shall be preceded by the words "practice limited to. . . . "

(b) If the lawyer is practicing primarily in that lawyer's listed fields of law practice, but also accepts other types of legal matters, such listing of fields of law practice shall be preceded by the words "practicing primarily in. . . . "

(c) In the case of a description or indication of limitation of practice communicated to the public in the classified section of telephone directories, newspapers, periodicals, or legal directories, there shall be contained within such communication, or prominently displayed on the same page of such communication, and contained in any electronic media communication the disclosure required under DR 2-101(A) and also a "Notice to the Public" in the following form:

> "A description or indication of limitation of practice does not mean that any agency or board has certified such lawyer as a specialist or expert in an indicated field of law practice, nor does it

mean that such lawyer is necessarily any more expert or competent than any other lawyer.

All potential clients are urged to make their own independent investigation and evaluation of any lawyer being considered. This notice is required by rule of the Supreme Court of Iowa."

In the case of a description or indication of limitation of practice communicated to the public in the classified section of telephone directories, a lawyer shall not permit that lawyer's name to be listed under a heading or classification other than "Attorneys" or "Lawyers," except as provided in DR 2-101(B)(2)(b).

(4) Prior to communication of a description or indication of practice permitted by DR 2-105(A)(2) a lawyer shall report the lawyer's compliance with the following eligibility requirements each year in the written report required to be submitted to the Commission on Continuing Legal Education:

(a) The lawyer must have devoted the greater of 200 hours or 20 percent of the lawyer's time spent in actual law practice to each separate indicated field of practice for each of the last two calendar years; and

(b) The lawyer must have completed at least ten hours of accredited continuing legal education courses of study in each separate indicated field of practice during the preceding calendar year.

The first report of compliance may be made in 1979. In reporting compliance with subsection (a), a statement of compliance is sufficient. In

reporting compliance with subsection (b), the lawyer shall identify the specific courses and hours which apply to each indicated field of practice. Contents of the portion of the report required by this rule shall be public information.

(B) If advertising uses the term general practice, the lawyer may not list areas of practice under DR 2-105 preceded by the words "practice limited to. . . . " The term general practice may be used if the listing of areas of practice is preceded by the words "practicing primarily in. . . . "

(C) The nature of one's professional practice, or the types of cases or matters handled, may not be described other than as permitted by DR 2-105 and DR 2-101(E).

(D) If, due to hardship or extenuating circumstances, a lawyer is unable to complete the hours of accredited continuing legal education during the preceding calendar year as required by DR 2-105(A)(4)(b), the lawyer may apply to the commission on continuing legal education for an extension of time in which to complete the hours. No extension of time shall be granted unless written application therefor shall be made on forms prescribed by the commission. Extensions of time within which to fulfill the minimum educational requirements may, in individual cases involving hardship or extenuating circumstances, be granted by the commission for a period not to exceed six months immediately following expiration of the year in which the requirements were not met.

STATEMENT OF THE CASE

The material facts of this case are not in dispute. They are set forth in the Stipulation of Facts (hereafter Stipulation) filed with the Grievance Commission of the Supreme Court of Iowa on January 28, 1997. The Stipulation is set forth in full in the Appendix filed herewith beginning at App. 11. The pertinent facts are summarized below.

Disciplinary Rule (hereafter DR) 2-105(A)(2) of the Iowa Code of Professional Responsibility lists certain approved phrases, called "fields of practice," which lawyers may use in their advertising to describe the kind of cases they handle only if, prior to publication of the advertising, they file a form with a commission of the Supreme Court of Iowa certifying compliance with "eligibility requirements" pursuant to DR 2-105(A)(4). Stipulation ¶20, App. 15. Lawyers must use the precise words approved by the Supreme Court to describe their practices and, with several exceptions, may not enlarge areas of practice with descriptive terminology. Stipulation ¶30, 31, App. 18-19.

Lawyers must certify that they have devoted a minimum period of time or percentage of their practice to each listed field of practice for each of the two calendar years prior to the year in which the advertisement is published and that they have completed at least ten hours of accredited Continuing Legal Education Courses of study in each listed field of practice during the calendar year preceding the year in which the advertisement is published. DR 2-105(A)(4); Stipulation ¶32, App. 19. Lawyers advertising approved fields of practice must

describe their practice as either "limited to" those fields or state that they "practice primarily in" those areas. DR 2-105(A)(2), (3); Stipulation ¶19, App. 15. Lawyers may not list more than three approved fields of practice in their advertising. DR 2-105(A)(2). Lawyers must annually recertify their compliance with the above requirements in order to advertise fields of practice in future years.

Prior to placing advertisements in the November 1994 Directory identifying specific fields of practice, Kirlin did not file with a commission of the Supreme Court of Iowa a Certificate of Eligibility. Stipulation ¶8, App. 12-13. In the November 1994 Directory Kirlin placed a display advertisement stating that he practiced primarily in Workers Compensation, Discrimination and Civil Rights, and Personal Injury law. Stipulation ¶5, App. 12. A copy of the advertisement is shown at App. 32. In the same directory Kirlin placed small display advertisements under column subject matter headings designated "Civil Rights" and "Employment-Labor." Stipulation ¶7, App. 12. In November 1994 lawyers in Iowa were not permitted to use the word "employment" in advertising except as a prefix to the phrase "Discrimination and Civil Rights Law." Effective January 3, 1995, lawyers were permitted to use the phrase "Employment Law" as a separate field of practice. Stipulation ¶29, App. 17.

Prior to placing the advertisements in the November 1995 Directory, Kirlin filed a Certificate of Eligibility listing Discrimination and Civil Rights, Workers Compensation, and Personal Injury. Prior to publication of the November 1995 Directory, Kirlin did not file a Certificate of Eligibility listing Employment Law as a field of practice. Stipulation ¶12, App. 13. In the November 1995

Directory Kirlin placed a display advertisement stating that he practiced primarily in Workers Compensation, Employment Law, and Discrimination and Civil Rights. Stipulation ¶10, App. 13. A copy of the advertisement is shown at App. 33.

At all times material to this action the Supreme Court of Iowa required lawyer advertising containing a listed field of practice permitted under DR 2-105(A)(2) to also contain the disclaimers set forth in DR 2-101(A) and DR 2-105(A)(3)(c). Kirlin did not challenge the constitutionality of these two disclaimers. At all times material to this action the disclaimers set forth in DR 2-101(A) and DR 2-105(A)(3)(c) were printed in the margin of all Yellow Pages advertising purchased by Kirlin in the Des Moines telephone directory. Stipulation ¶13, App. 13.

Effective July 1, 1994, the Supreme Court of Iowa amended DR 2-101(C) to require lawyers listing professional affiliations in their advertisements to print an additional two-paragraph disclaimer within the advertisement. Stipulation ¶14, App. 14. In the November 1994 and November 1995 Directories Kirlin stated that he was a member of the following professional organizations: National Employment Lawyers Association, Iowa Association of Workers Compensation Lawyers, Inc., and the Iowa State Bar Association. Kirlin also stated that he was a member of the following sections of the Iowa State Bar Association: Labor & Employment Law, Workers Compensation, and Litigation. Stipulation ¶6, 11, App. 12-13. Kirlin did not print the disclaimer required by DR 2-101(C) in his advertisements in either directory. Stipulation ¶15, App. 14.

At all times material to this action Kirlin did, in fact, represent clients and accept cases in the areas of practice listed in his advertisements. Stipulation ¶16, App. 14. At all such times Kirlin was, in fact, a member of the professional organizations listed in his advertisements. Stipulation ¶17, App. 14. Kirlin's statements regarding the areas in which he practiced and his affiliation with certain professional organizations were neither unlawful nor misleading.

The Iowa Supreme Court Board of Professional Ethics & Conduct initiated a Complaint before the Grievance Commission of the Supreme Court of Iowa on October 9, 1996. Kirlin filed an Answer on October 25, 1996, in which he challenged the constitutionality of DR 2-101(C) and DR 2-105(A)(2), (3) and (4) on the grounds that they were impermissible restrictions of commercial speech protected under state and federal constitutional law and that they constituted an unconstitutional taking under state and federal constitutional law. On January 28, 1997, the parties to the proceeding before the Grievance Commission filed the Stipulation of Facts filed herewith, which references the constitutional challenges asserted by Kirlin. Stipulation ¶48, App. 22. The Grievance Commission filed its Findings, Conclusions and Recommendations on April 22, 1997. The Grievance Commission found that Kirlin violated the advertising rules adopted by the Supreme Court of Iowa. The Commission did not address the constitutional challenges asserted by Kirlin.

Kirlin appealed the Grievance Commission's Findings, Conclusions and Recommendations to the Supreme Court of Iowa by filing a Notice of Appeal on May 2, 1997. Kirlin contended on appeal that DR 2-105 violated

his rights under federal First Amendment doctrine and similar state constitutional provisions by prohibiting him from using any language to describe the nature of his practice other than a few phrases permitted under DR 2-105; by limiting the number of fields of practice he may list in his advertising to three; by requiring him to satisfy eligibility requirements, including two years of experience and at least ten hours of continuing legal education each year for each field of practice prior to making any communication to prospective clients of the permitted phrases describing fields of practice; by requiring him to use a disclaimer required under DR 2-101(C) regarding listing of professional affiliations, which is duplicative of disclaimers already required under DR 2-101(A), regarding lawyer advertising in general, and DR 2-105(A)(3), regarding listing of fields of practice; and by requiring him to characterize his practice as limited to, or as practicing primarily in specified fields of law, then using the rationale of potentially misleading representations of lawyer specialization to justify the requirements described above.

The Supreme Court of Iowa issued its decision on the appeal on November 26, 1997. The court summarily rejected Kirlin's constitutional challenge to the experience and training requirements imposed under DR 2-105(A)(4) on lawyers advertising fields of practice. App. 6. In support of its holding, the court relied upon its analysis of a similar constitutional challenge to the same rule asserted in *Iowa Supreme Court Board of Professional Ethics & Conduct v. Wherry*, 569 N.W.2d 822 (Iowa 1997), filed one month prior to the instant decision. In *Wherry* the Supreme Court of Iowa concluded that the experience

and training requirements of DR 2-105(A)(4) were constitutionally permissible under *Central Hudson Gas & Electric Corp. v. Public Service Comm.*, 447 U.S. 557, 100 S. Ct. 2343, 65 L.Ed.2d 341 (1980) and *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 115 S. Ct. 2371, 132 L.Ed.2d 541 (1995) because advertising including any description of a field of practice without the additional training is *actually*, and not merely potentially, misleading. 569 N.W. 2d at 826.

The court rejected Kirlin's challenge to the provision of DR 2-105(A)(2) prohibiting lawyers from listing more than three fields of practice in their advertising on the ground that Kirlin did not "develop an argument in support of this assertion." App. 8. In fact, Kirlin briefed and argued all of the arguments listed above. Kirlin specifically devoted four pages of his Reply Brief and Argument before the Supreme Court of Iowa to a discussion of the requirements in DR 2-105(A)(2). See Excerpts from Reply Brief and Argument set forth in the Appendix filed herewith beginning at App. 25-31.

Kirlin noted that DR 2-105(A)(2) barred the use of thousands of commonly used words and phrases to describe to prospective clients the types of cases which Kirlin handled; that telling consumers in plain English of the types of claims he handles is neither actually nor potentially misleading; that it is constitutionally impermissible to characterize each adjective or phrase used as a separate and distinct field of practice, to limit a lawyer to three approved phrases, to require lawyers to obtain ten hours of continuing legal education for each phrase used in advertising and to certify experience in each field of practice as a condition for advertising truthful descriptions of their practice. *Id.*

The court did not address the other challenge Kirlin asserted to DR 2-105(A) – that the principal source of potentially misleading information in lawyer advertising in Iowa is the requirement under DR 2-105(A)(3) that lawyers listing a field of practice must advertise that their practice is limited to, or that they practice primarily in, the listed field of practice. The court rejected Kirlin's argument that the disclaimer mandated under DR 2-101(C) for listings of professional affiliations was unconstitutional. The court reasoned that this disclaimer served a different purpose than the other disclaimers required under DR 2-101(A) and DR 2-105(A)(3). App. 6.

The court held that Iowa constitutional provisions regarding freedom of speech are coextensive with the federal constitution and noted that state and federal claims regarding freedom of speech "would be treated simultaneously." App. 6. The court denied Kirlin's state constitutional claims on the basis that the court rejected his federal constitutional claims. *Id.* Despite the court's suggestion that Kirlin did not mount a constitutional claim against the provisions of DR 2-105(A)(2) limiting the number and description of fields of practice, it is apparent that this was, in fact, part and parcel of Kirlin's challenge to the disciplinary rules governing lawyer advertising in Iowa. Accordingly, Kirlin timely raised the federal question presented to this Court and the decision of the Supreme Court of Iowa does not rest upon adequate state grounds independent of federal law.

REASONS FOR GRANTING THE WRIT

This Court has jurisdiction to review state court decisions in which the validity of state law is drawn into question on the ground that it is repugnant to the federal constitution or laws. 28 U.S.C. § 1257. The exercise of jurisdiction by state courts over cases involving issues of federal law is subject to two conditions which secure state court compliance with and national uniformity of federal law: First, state courts must interpret and faithfully enforce the supreme law of the land; Second, the state court's decisions are subject to review by this Court. *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 29, 110 S. Ct. 2238, 2246, 110 L.Ed.2d 17, 31 (1990). The issues raised in this petition clearly call into question whether the Supreme Court of Iowa is, in fact, faithfully enforcing the supreme law of the land in the face of a legal challenge to the court's own advertising rules.

The State of Iowa has the burden of proof to establish that the provisions of DR 2-101 and 2-105 satisfy the three-prong test articulated in *Central Hudson*, 447 U.S. at 564-65, 100 S. Ct. at 2350-51, 65 L.Ed.2d at 350-51. Specifically, the court must: (1) identify a substantial state interest; (2) find that the rules in question directly and materially advance that interest; and (3) conclude that the rules in question are narrowly tailored to achieve the substantial state interest. *Id.*, *Florida Bar*, 515 U.S. at 624, 115 S. Ct. at 2376, 132 L.Ed.2d at 549.

In *Wherry* the court concluded that its experience and annual training requirements of DR 2-105(A)(4) "easily" satisfy the three-prong test of *Central Hudson*. 569 N.W.2d

at 825. The court initially identified the substantial state interest as protection of "the public interest in *informed* selection of legal representation. False claims of expertise are a real danger to those who need and are searching for legal services." (emphasis in original) *Id.*

The court concluded that "advertising by an Iowa lawyer in fields of practice without the training required in accordance with our rule is *misleading*." (emphasis added) 569 N.W.2d at 826. The court specifically rejected the argument that advertising without the required training and experience is, at most, only potentially misleading. *Id.* The court based its conclusion on the purported finding of a special master in 1988 that "the public, in relying upon listings of fields of practice, assumes that the attorney has additional education and expertise in the advertised field of practice." *Id.*

The sole empirical basis for the special master's finding was a study of "Consumer Attitudes Toward Yellow Pages Legal Advertising" by Frank N. Magid and Associates, Exhibit M to the Stipulation of Facts filed herein. Magid surveyed 100 adult Iowans in Des Moines and Cedar Rapids in November 1988 regarding their perceptions of attorneys in general, their perceptions of attorneys who advertise, and their reactions to specific forms of written advertisements and disclaimers found in Iowa law.

Magid found that 72 percent of those surveyed "believe the law today is so complicated that an individual lawyer can specialize in only one or two areas," and doubted the skills and integrity of law firms which advertised many specialties. Stipulation Exhibit M at p. 106.

Ninety-two percent of those surveyed felt the lawyers they personally knew were competent; 91 percent felt the lawyers they knew were experienced; *and 65 percent felt that the lawyers they knew were knowledgeable about most areas of the law.* Stipulation Exhibit M at p. 94. The Magid investigators did not report any objective evidence that lawyers who advertise are, as a group, less knowledgeable about most areas of the law than were the lawyers personally known to the survey subjects.

Magid asked survey respondents about the advertising disclaimers then required by Iowa law. Sixty-four percent of those surveyed judged the disclaimer contained in DR 2-105 to be "very clear" and 76 percent of those surveyed judged the disclaimer contained in DR 2-101(A) to be "very clear." Forty-one percent of those surveyed felt the disclaimers provided useful information and the rest of those surveyed felt the disclaimers contained information *they already knew.* Stipulation Exhibit M at p. 108. When asked to explain the disclaimers, most of those surveyed by Magid said the disclaimers "tell you not to trust the ad" or to "choose your lawyer carefully." *Id.*

Magid's data demonstrate that consumers possess a healthy skepticism toward lawyer advertising and that consumer skepticism is amply reinforced by the disclaimers required in DR 2-101(A) and 2-105(A)(3). The Iowa court's finding to the contrary is simply not supported by any factual evidence in the record. The Iowa court declined to address Kirlin's argument that the court's advertising rules are the primary source of misrepresentation regarding specialization due to the

requirement that lawyers describe their practice as being primarily in, or limited to, listed areas.

The Iowa court found that its advertising rules directly and materially advance the state's interest because another lawyer in an unrelated disciplinary proceeding "held himself out as being qualified in the area of immigration law" but was not and later failed to provide competent legal services resulting in deportation of the client. App. 9. It is not clear why the court continued to apply the *Central Hudson* test in light of its conclusion that any advertising describing a field of practice without obtaining additional training is actually misleading. If the court is correct, it may freely regulate the speech in question and need not justify its regulations under the tripartite test. *Florida Bar*, 515 U.S. at 624, 115 S. Ct. at 2376, 132 L.Ed.2d at 549.

The court in *Wherry* concluded that the eligibility requirements of DR 2-105(A)(4) are narrowly drawn and strike a "reasonable balance" between the public's right to have a lawyer qualified in the field advertised and not making the training requirements "more onerous than . . . absolutely necessary to justify the advertised claims." 569 N.W.2d at 825. It should be noted that the court alters its definition of the substantial state interest at this point. It changes from protecting "the public interest in informed selection of counsel. . . . " to ensuring "the public's right to have a lawyer qualified in the field advertised. . . . " *Id.*

In fact, the Supreme Court of Iowa has repeatedly declined to act on proposals seeking to ensure that

Iowans have lawyers qualified in fields of special competence. Lawyers petitioned the court in 1985 to adopt a plan permitting Iowa lawyers to certify areas of specialization in legal practice upon completion of additional training and experience. The court declined to act on the proposal and referred it to a study committee. Stipulation ¶35, App. 20. In 1986 the study committee recommended that the court establish a voluntary program of formal training under which lawyers could certify their expertise in five fields of law. The court declined to act on that proposal. Stipulation ¶36-38, App. 20.

The sole group of lawyers in Iowa required to certify as specialists and to obtain additional training and experience are those who seek to tell prospective clients what types of claims the lawyer customarily handles. Those lawyers must obtain ten hours of CLE for each descriptive phrase they use and must certify two years of experience for each such phrase concluding the year before the year in which the lawyer advertises. DR 2-105(A)(4).

Some lawyers may in fact be specialists in the areas which they list in their advertising. Many are not and do not purport to be, except as the Iowa advertising rules force them to imply that they specialize in the areas listed. Most lawyers, both those who advertise and those who don't, will conduct their practices in a conscientious manner. Some will not. There is no evidence, anecdotal or otherwise, that malpractice occurs with any greater frequency among lawyers who advertise than among those who don't. No one questions the authority of the Iowa court to implement statewide programs to improve lawyer competency and deter malpractice. But the state may

not single out lawyers engaging in constitutionally protected speech for enforcement of standards not applicable to the bar as a whole. Yet that is precisely what the Iowa court does.

It is certain that the court's advertising rules have had a profoundly chilling effect on the use of advertising by Iowa lawyers. While 54 percent of Wisconsin lawyers advertised in 1989, only 22 percent of Iowa lawyers did so. The difference between lawyer advertising in the adjacent states remained constant without regard to the lawyer's age, size or location of firm, *or whether the firm specialized in an area of practice*. J. Rossi & M. Weighner, *An Empirical Examination of the Iowa Bar's Approach to Regulating Lawyer Advertising*, 77 Iowa L. Rev. 179, 245 (1991).

The Iowa court did not discuss whether any less burdensome alternatives exist which would remedy the allegedly misleading representations of specialization. Surprisingly, the court failed to address the efficacy of the most prominent alternative – the disclaimers mandated by DR 2-101(C) and DR 2-105(A)(3). Counsel for the Board argued before the Iowa court that these disclaimers are ineffective to cure the misleading representations of specialization found by the court. The Iowa court concluded that advertising professional affiliations without the disclaimer "could be misleading." App. 7. The court did not explain why the disclaimer regarding professional affiliations would be any more effective than the disclaimers required under DR 2-101(A) and 2-105(A)(3). The court did not explain how the additional disclaimer will alleviate to a material degree the harms identified by the state. *Florida Bar*, 515 U.S. at 626, 115 S. Ct. at 2377, 132 L.Ed.2d at 550.

This court applied the *Central Hudson* test in *In the Matter of R.M.J.*, 455 U.S. 191, 206-07, 102 S. Ct. 929, 938-39, 71 L.Ed.2d 64, 76-77 (1982), and held that a Missouri lawyer's listing of 23 areas of practice in his Yellow Pages advertising was neither actually nor potentially misleading and that the State of Missouri did not have a substantial state interest in requiring the lawyer to use only the terminology required by the state in describing the types of cases which the lawyer is willing to handle. *Id.*

In *Wherry* the Iowa court distinguished *R.M.J.* on the ground that the Missouri rule "involved an absolute ban on advertising fields of practice except by language specified by the rule (and that) our ban is not so absolute. Iowa lawyers, after meeting the eligibility requirements, are free to advertise within reasonable limits." 569 N.W.2d at 826. In fact, counsel for the Iowa Supreme Court Board of Professional Ethics & Conduct stipulated in the instant action that the Iowa advertising rules prohibit lawyers from describing any substantive field of law in which they practice in terms other than those specifically set forth in DR 2-105, or in opinions issued by the Board or its predecessor, and require lawyers to describe their practice as limited to, or practicing primarily in, any listed field of practice. Stipulation ¶19, 20, App. 15. When these restrictions are combined with the eligibility requirements of DR 2-105(A)(3), it is impossible to conclude that Iowa's advertising restrictions are somehow less absolute than Missouri's.

The rules on lawyer advertising adopted by the Supreme Court of Iowa are nationally recognized as among the most restrictive in the United States. J. Rossi &

M. Weighner, *An Empirical Examination of the Iowa Bar's Approach to Regulating Lawyer Advertising*, 77 Iowa L. Rev. at 202. More recently, the American Bar Association Commission on Advertising identified three models of state regulation of lawyer advertising: one model based on the ABA Model Rules of Professional Conduct prohibiting only false or misleading information; another model permitting the distribution of "limited information" and prohibiting emotional appeals and dramatization; and a third model "designed to create barriers to advertising that result in its abolition." The Commission identified Iowa as the only state employing the third model. American Bar Association Commission on Advertising, *Lawyer Advertising at the Crossroads: Professional Policy Considerations*, p. 4 (1995).

In summary, the Supreme Court of Iowa has outlawed most of the English language in lawyer advertising and requires lawyers who want to use the few permissible phrases to wait several years and attend ten hours of CLE seminars for each adjective used, at a cost of thousands of dollars. The sole rationale for this is that lawyers who tell the public what kind of cases they handle are misleading the public, even when their advertising is accompanied by extensive and repetitive disclaimers. The Iowa advertising rules challenged in this case are not a temporary interruption of one avenue of communication with prospective clients while other avenues remain untrammeled. *Cf. Florida Bar*, 515 U.S. at ___, 115 S. Ct. at 2380, 132 L.Ed.2d at 555. Rather, the Iowa advertising rules are a calculated effort to deny by regulation that which the court cannot ban outright under federal law. If the challenged rules are permitted to stand, thousands of

Iowans will be denied access to meaningful information about legal services which is routinely available to citizens of other states. Furthermore, it will embolden other states to adopt the "abolitionist" model of legal advertising regulation to the detriment of millions of legal consumers throughout the United States.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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IN THE SUPREME COURT OF IOWA

No. 284/97-773

Filed November 26, 1997

IOWA SUPREME COURT BOARD OF
PROFESSIONAL ETHICS AND CONDUCT,

Appellee,

vs.

KEVIN M. KIRLIN,

Appellant.

On review of the report of the Grievance Commission.

Respondent in attorney disciplinary case appeals from findings and recommendations of Grievance Commission. **ATTORNEY REPRIMANDED.**

John P. Roehrick and Kevin M. Kirlin, pro se, of Roehrick, Hulting, Blumberg, Kirlin & Krull, P.C., Des Moines, for appellant.

Norman G. Bastemeyer and Charles L. Harrington, Des Moines, for appellee.

Considered by Harris, P.J., and Larson, Carter, Lavorato, and Snell, JJ.

LARSON, Justice.

Attorney Kevin Kirlin has appealed from a grievance commission recommendation of a public reprimand for violations of our disciplinary rules governing attorney advertising. We agree with the commission's findings and order that he be publicly reprimanded.

The disciplinary charges arose out of ads placed by Kirlin in a Des Moines telephone directory for the 1994-95 and 1995-96 years. In those ads, Kirlin listed several areas of primary practice and stated that he was a member of several professional organizations provided specialized education in those areas. The Board of Professional Ethics and Conduct alleges that (1) he failed to comply with rules requiring information to be filed, prior to advertising, with our Commission on Continuing Legal Education, (2) he failed to include cautionary statements in his ads, and (3) he listed more than the three areas of practice permitted by the rules.

Since *Bates v. State Bar of Arizona,* 433 U.S. 350, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977), lawyers have been permitted to advertise under certain conditions. Under our code of professional responsibility, an attorney may advertise in telephone directories and other forms of media. This case involved only telephone directory ads; it does not involve electronic media advertising.

Advertising restrictions imposed by our rules have been upheld on the face of a variety of constitutional challenges. *See, e.g., Iowa Sup. Ct. Bd. of Prof'l Ethics & Conduct v. Wherry,* ___ N.W.2d ___ (Iowa 1997); *Committee on Prof's Ethics & Conduct v. Morris,* 490 N.W.2d 806 (Iowa 1992); *Committee on Prof'l Ethics & Conduct v. Humphrey,* 377 N.W.2d 643 (Iowa 1985).

In its most recent case involving attorney advertising, the Supreme Court stated the test for constitutionality of restrictions:

> [W]e engage in "intermediate" scrutiny of restrictions on commercial speech, analyzing

> them under the framework set forth in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of N.Y.*, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980). Under *Central Hudson*, the government may freely regulate commercial speech that concerns unlawful activity or is misleading. Commercial speech that falls into neither of those categories, like the advertising at issue here, may be regulated if the government satisfies a test consisting of three related prongs: first, the government must assert a substantial interest in support of its regulation; second, the government must demonstrate that the restriction on commercial speech directly and materially advances that interest; and third, the regulation must be "narrowly drawn."

Florida Bar v. Went For It, Inc., 515 U.S. 618, 623-24, 115 S. Ct. 2371, 2375-76, 132 L. Ed. 2d 541, 549 (1995) (citations omitted); *see also Wherry*, ___ N.W.2d at ___.

I. ***The Charges.***

The charges in this case involved three of our disciplinary rules.

A. DR 2-101(C) requires, in the ad, this "notice to the public":

> Memberships and offices in legal fraternities and legal societies, technical and professional licenses, and memberships in scientific, technical and professional associations and societies of law or field of practice do not mean that a lawyer is a specialist or expert in a field of law, nor do they mean that such lawyer is necessarily any more expert or competent than any other lawyer.

The respondent's ads in the 1994-95 and 1995-96 directories did not contain this disclosure.

B. The respondent was also charged with a violation of DR 2-105(A)(4), which requires that:

> Prior to communication of a description or indication of practice permitted by DR 2-105(A)(2) a lawyer shall report that lawyer's compliance with the following eligibility requirements each year in the written report required to be submitted to the Commission on Continuing Legal Education:
>
> (a) The lawyer must have devoted the greater of 200 hours or 20 percent of the lawyer's time spent in actual law practice to each separate indicated field of practice for each of the last two calendar years; and
>
> (b) The lawyer must have completed at least ten hours of accredited continuing legal education courses of study in each separate indicated field of practice during the preceding calendar year.
>
> The first report of compliance may be made in 1979. In reporting compliance with subsection (a), a statement of compliance is sufficient. In reporting compliance with subsection (b), the lawyer shall identify the specific courses and hours which apply to each indicated field of practice. Contents of the portion of the report required by this rule shall be public information.

Kirlin did not report his compliance with eligibility requirements prior to placing his ads in the telephone directory.

C. DR 2-105(A)(2) prohibits listing more than three areas of practice, and the respondent is charged with violating this rule as well.

II. *The Respondent's Arguments.*

The respondent does not claim that he has complied with the advertising rules at issue; he attacks the constitutionality of the rules themselves. The respondent contends that DR 2-101 and DR 2-105 are invalid on their face and as applied to him because they impermissibly restrict his communications with prospective clients in violation of the First and Fourteenth Amendments to the United States Constitution and article I, section 7 of the Iowa Constitution. He also challenges DR 2-101 on the ground that, as applied, it constitutes a taking of his property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution and article I, section 18 of the Iowa Constitution.

III. *Analysis.*

Our review in disciplinary cases is de novo. Ct. R. 118.10, .11. We give respectful consideration to the findings of the commission but are not bound by them. *Iowa Sup. Ct. Bd. of Prof'l Ethics & Conduct v. Postma*, 555 N.W.2d 680, 681 (Iowa 1996).

A. *DR 2-105(A)(4).* We held in *Wherry* that DR 2-105(A)(4) satisfies the test for constitutionality in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980) (and thus the test later adopted for attorney advertising

in *Florida Bar*). *Wherry*, ___ N.W.2d at ___. We therefore summarily reject Kirlin's similar challenge to that rule here. Our state constitutional provisions regarding freedom of speech have generally been held to be coextensive with the federal constitution, and Kirlin's argument based on the Iowa Constitution must therefore fail as well. *See State v. Lacey*, 465 N.W.2d 537, 539-40 (Iowa 1991) (state and federal claims regarding freedom of speech treated simultaneously); *Des Moines Register & Tribune Co. v. Osmundson*, 248 N.W.2d 493, 498 (Iowa 1976) (same).

B. *DR 2-101(C)*. In 1994 this court amended DR 2-101(C) to require that advertising containing references to memberships in professional organizations include the "notice to the public" quoted above. Kirlin's advertisements in the 1994-95 and 1995-96 telephone directories did not comply.

Kirlin complains that the notice under DR 2-101(C) is duplicative of a warning required by DR 2-101(A), which advises consumers that the selection of a lawyer should not be based solely on advertising. He contends that this creates undue expenses in advertising and apparently that this will chill a lawyer's exercise of his First Amendment rights.

The warnings under DR 2-101(C) and DR 2-101(a), however, have different purposes. The warning required by DR 2-101(C) cautions the consumer not to give undue weight to membership in associations; DR 2-101(A) warns consumers not to be swayed by advertising in selecting a lawyer.

DR 2-101(C) was amended in 1994 because this court was concerned, based on advice by the Committee on Professional Ethics and Conduct that

> [t]here have been instances where such [membership] listings have been used to imply expertise in areas of practice such as listed in DR 2-105 but circumventing the qualification and disclosure requirements of DR 2-105. The lawyer merely joins an organization or entitles an article using the desired "buzzword" area of practice (for example: "Member of American Trial Lawyer Sections on Motor Vehicle Collision, Railroad Law . . . etc.," or "Co-author-Automobile Accident Law and Practice") without proper disclosure. This results in misleading advertising.

(Letter from Committee on Professional Ethics & Conduct to Iowa Supreme Court of 12/28/93.)

We conclude that DR 2-101(C) is not duplicative of other disclaimers and that it passes the test for constitutionality under *Florida Bar.* The State has a substantial interest in supporting this restriction because "[f]alse claims of expertise are a real danger to those who need and are searching for legal services." *Wherry,* ___ N.W.2d at ___. The rule in question is narrowly drawn and advances the state's interest. Advertising a membership in law-related associations without informing the public of the danger of equating membership in professional associations and expertise as a lawyer could be misleading.

Kirlin also argues that the notice requirements of DR 2-101(C) constitutes a taking of his property for public

use without just compensation contrary to the federal and state constitutions. He cites no authority for this proposition, and we have found none. We therefore deem the argument waived. Iowa R. App. P. 14(a)(3).

C. *DR 2-105(A)(2).* Kirlin complains that DR 2-105(A)(2), which limits to three the number of areas of practice that may be advertised, is unconstitutional. However, he does not develop an argument in support of this assertion, and we reject it. There is a limit to the number of areas in which an attorney may reasonably claim to concentrate, and we believe that three is reasonable.

IV. *Summary.*

The first test under *Florida Bar,* that a substantial state interest is involved in the restriction, is clearly established in this case. What we said in *Wherry* with respect to some of our advertising rules applies as well to the balance of them. We said there that

> Iowa government, particularly its judicial branch, has a clear responsibility to protect the public interest in *informed* selection of legal representation. False claims of expertise are a real danger to those who need and are searching for legal services.

Wherry, ___ N.W.2d at ___.

Under the second part of the *Florida Bar* test, the question is whether the government's restriction on commercial speech directly and materially advances the state's interest. As the Supreme Court said in *Florida Bar,*

> [t]hat burden . . . "is not satisfied by mere speculation and conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."

Florida Bar, 515 U.S. at 626, 115 S. Ct. at 2377, 132 L. Ed. 2d at 550 (quoting *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487, 115 S. Ct. 1585, 1592, 131 L. Ed. 2d 532, 541-42 (1995)).

Committee on Professional Ethics & Conduct v. Morris illustrates how the rules in question advance the state's interest in informing the public. In *Morris* a lawyer held himself out as being qualified in the area of immigration law, although he was clearly not. His client relied on that representation, but the lawyer failed to perform his services in a proper way, and his client was subjected to deportation proceedings. *Morris*, 490 N.W.2d at 807.

Kirlin has raised several additional arguments attacking the disciplinary rules on constitutional grounds. We have considered each of them and find no merit in them.

V. *Disposition.*

Failure of a lawyer to abide by our disciplinary rules regarding advertising will subject the lawyer to sanctions. *Wherry*, ___ N.W.2d at ___; *Morris*, 490 N.W.2d at 810.

Like Wherry, this respondent has previously been admonished for violations of our advertising rules, and we take that into consideration in determining the sanction to be imposed, as we did in *Wherry*. We publicly

reprimand the respondent for his violations of our Iowa Code of Professional Responsibility.

ATTORNEY REPRIMANDED.

BEFORE THE GRIEVANCE COMMISSION
OF THE SUPREME COURT OF IOWA

IOWA SUPREME COURT BOARD OF PROFESSIONAL ETHICS AND CONDUCT,	:	DOCKET NO. 400
Complainant,	:	
vs.	:	STIPULATION
KEVIN M. KIRLIN,	:	OF FACTS
Respondent.	:	

COME NOW the parties to this proceeding and agree to the following Stipulation of Facts:

1. In 1993 the Committee on Professional Ethics and Conduct admonished Kirlin for advertising in the U.S. West telephone directory for Des Moines that he practices primarily in personal injury law and workers compensation law without first filing with the Continuing Legal Education Commission of the Iowa Supreme Court a certificate of eligibility to list those areas of practice.

2. Kirlin timely took exception to the admonition on the ground that the provisions of DR2-105(A)(4) which limit the description of areas of practice, impose eligibility requirements and require certification prior to advertising legal services violate his right to free speech under the Constitution of the State of Iowa and the Constitution of the United States.

3. The Committee on Professional Ethics and Conduct subsequently rejected Kirlin's exception and reaffirmed its admonition.

4. Kirlin placed a display advertisement which was printed on page 53 of the Des Moines telephone directory published by U.S. West in November 1994. A true and correct copy of the advertisement is set forth in Exhibit A attached hereto.

5. In the advertisement set forth in Exhibit A, Kirlin stated that he practiced primarily in the following areas of law: Workers Compensation, Discrimination and Civil Rights, Personal Injury.

6. In the advertisement set forth in Exhibit A, Kirlin stated that he was a member of the following professional organizations: National Employment Lawyers Association, Iowa Association of Workers Compensation Lawyers, Inc., and the Iowa State Bar Association. Kirlin also stated that he was a member of the following sections of the Iowa State Bar Association: Labor & Employment Law, Workers Compensation, and Litigation.

7. Kirlin placed additional display advertisements under subject matter headings designated "Civil Rights" and "Employment-Labor" and printed on pages 68 and 69 of the Des Moines telephone directory published by U.S. West in November 1994. True and correct copies of these advertisement are set forth in Exhibits B and C attached hereto.

8. Prior to publication of the advertisements set forth in Exhibits A, B, and C, Kirlin did not file with the Continuing Legal Education Commission of the Iowa Supreme

Court a certificate of eligibility to list the areas of practice set forth in the advertisements.

9. Kirlin placed a display advertisement which was printed on page 60 of the Des Moines telephone directory published by U.S. West in November 1995. A true and correct copy of the advertisement is set forth in Exhibit D attached hereto.

10. In the advertisement set forth in Exhibit D, Kirlin stated that he practiced primarily in the following areas of law: Workers Compensation, Employment Law, and Discrimination and Civil Rights.

11. In the advertisement set forth in Exhibit D, Kirlin stated that he was a member of the following professional organizations: National Employment Lawyers Association, Iowa Association of Workers Compensation Lawyers, Inc., and the Iowa State Bar Association. Kirlin also stated that he was a member of the following sections of the Iowa State Bar Association: Labor & Employment Law, Workers Compensation, and Litigation.

12. Prior to publication of the advertisement set forth in Exhibit D, Kirlin filed with the Continuing Legal Education Commission of the Iowa Supreme Court a certificate of eligibility listing the following areas of practice: Discrimination and Civil Rights, Workers Compensation, and Personal Injury. Prior to publication of the advertisement set forth in Exhibit D, Kirlin did not file a certificate of eligibility listing employment law as an area of practice.

13. The advertising set forth in Exhibits A through D contained disclaimers required by DR2-101(A) and DR2-105(A)(3)(c).

14. Effective July 1, 1994, the Supreme Court of Iowa amended DR2-101(C) to require that advertising which contains references to membership in professional organizations or associations include a disclaimer set forth in DR2-101(C). A true and correct copy of the Court's order is set forth in Exhibit E attached hereto.

15. The advertisements set forth in Exhibits A through D did not contain the disclaimer required in DR2-101(C).

16. At all times material to this proceeding Kirlin did, in fact, represent clients and accept cases in the areas of workers compensation; unemployment compensation; various aspects of employer-employee relationships including compliance with state and federal laws regulating wages, hours, and other terms and conditions of employment, equal pay, medical leave, disability leave, medical inquiries regarding employees, and discharge of employees; various tort and contract claims arising out of termination of employees in violation of contract or in retaliation for the employee's exercise of legal rights or pursuit of statutory entitlements; employee-union relationships including denial of duty of fair representation; civil rights claims arising from employment relationships, denial of public accommodations, or enforcement of criminal laws; and personal injury claims arising from bodily injury.

17. At all times material to this proceeding Kirlin was in fact a member of the National Employment Lawyers Association, the Iowa Association of Workers Compensation Lawyers, Inc., the Iowa State Bar Association and its sections on Labor and Employment Law, Workers Compensation, and Litigation.

18. The Ethical Considerations and Disciplinary Rules adopted by the Iowa Supreme Court and set forth in Canon 2 of the Iowa Code of Professional Responsibility for Lawyers, and their predecessor provisions, (hereafter the Iowa Advertising Rules) are incorporated in this Stipulation by reference as though set forth fully herein.

19. By reason of DR2-105(A)(2), DR2-105(A)(3), and DR2-105(C), lawyers are prohibited by the Iowa Advertising Rules from characterizing the nature of their practice in any specific field of law other than to say that their practice is limited to, or that they practice primarily in, specified fields of law.

20. Under the Iowa Advertising Rules lawyers are prohibited from describing a specific substantive field of law in which they practice in terms other than those set forth in DR2-105, or in terms permitted by opinions interpreting DR2-105 issued by the Committee on Professional Ethics and Conduct of the Iowa State Bar Association or by its successor, the Iowa Supreme Court Board of Professional Ethics and Conduct.

21. There are 4,144 lawyers currently engaged in the full-time private practice of law within the State of Iowa and another 1,109 lawyers engaged in the part-time practice of law within the State of Iowa. The number of these attorneys who have filed a certificate or report of eligibility to indicate an area of practice, as shown by the records of the Commission on Continuing Legal Education, is set forth in Exhibit F attached hereto.

22. A true copy of the form to be used by an attorney who wishes to report eligibility is set forth in Exhibit G attached hereto.

23. A lawyer who wishes to expand the information relating to areas of practice that may be indicated in lawyer advertising may seek changes in the advertising rules by making a request to the Iowa Supreme Court Board of Professional Ethics and Conduct pursuant to DR2-105(A)(2) or by filing an application with the Board pursuant to Ethics and Conduct Rules 5.1 *et seq.*

24. The Board has forwarded such requests for changes to the Court on several occasions and the Court has acted thereon to expand the listing of areas of practice that may be indicated in advertisements. Recent examples of such action by the Board and Court include the additions of "employment law," effective January 3, 1995, and "construction law," effective August 1, 1995, and "adoption law" effective January 24, 1995, to the list of areas of practice in DR2-105(A)(2). True and correct copies of the correspondence and orders relating to said additions are set forth in Exhibits H ("employment law"), I ("construction law"), and J ("adoption law") attached hereto.

25. Respondent has never sought any change in the advertising rules as permitted by DR2-105(A)(2) or by Ethics and Conduct Rules 5.1 *et seq.*

26. On April 28, 1989, DR2-101, 2-102, and 2-105 of the Iowa Code of Professional Responsibility for Lawyers were amended, effective June 1, 1989. The amendment followed an opportunity for comment by members of the Bar and hearing in which evidence was received regarding the proposed changes to the rules, as shown by true and correct copies of a notice published in May 1988 News Bulletin of the Iowa State Bar Association (Exhibit K); September 15, 1988 Order of the Supreme Court of

Iowa (with attached letter from Michael Figenshaw, proposed changes to portions of Canon 2 of the Iowa Professional Code of Responsibility for Lawyers, and "Summary of Evidence, Findings of Fact and Conclusions of Special Master, Thomas A. Finley") (Exhibit L); Magid study "Consumer Attitudes Toward *Yellow Pages* Legal Advertising (part of the evidence received by Special Master Finley) (Exhibit M); and April 28, 1989 Order of the Supreme Court of Iowa (Exhibit N), all of which exhibits are attached hereto. Respondent did not file comments with, or objections to, the amendments described above prior to their adoption.

27. Respondent has been licensed to practice law in the State of Iowa since 1984. Respondent has been in private practice since June 1987. Respondent first purchased advertising in the U.S. West Yellow Pages in July 1990 for placement in the 1990-91 Des Moines telephone directories published by Telecom in October 1990 and by U.S. West in November 1990. Respondent has been a member of the Iowa State Bar Association since at least 1984.

28. The disclosure required by DR2-101(C) and referred to in paragraphs 14 and 15 above was added to that rule effective July 1, 1994, upon request of the Iowa Supreme Court Board of Professional Ethics and Conduct, as shown by true copies of the relevant correspondence and order as set forth in Exhibit O attached hereto.

29. Prior to January 3, 1995, the Iowa Advertising Rules prohibited lawyers from advertising that the lawyer practiced, primarily or otherwise, in the field of "Employment Law." Since January 3, 1995, the Iowa Advertising Rules have permitted lawyers to advertise that the lawyer's

practice is limited to, or that the lawyer practices primarily in, the field of "Employment Law," provided that lawyers making such statements timely comply with continuing legal education (CLE) and other requirements set forth in the Iowa Advertising Rules and timely certify such compliance prior to making any such statements.

30. On February 20, 1990, the Committee on Professional Ethics and Conduct of the Iowa State Bar Association rendered Formal Opinion 89-46 stating that it is permissible under the Iowa Advertising Rules for lawyers to use the terms "job" or "employment" in connection with the phrase "Discrimination and Civil Rights Law" specified in DR2-105. In the same opinion and in Formal Opinion 88-33, the Committee cautioned lawyers that they are not otherwise permitted to "enlarge areas of practice with descriptive terminology. . . . " One of the examples given of proscribed conduct is substituting "divorce" for "Domestic Relations and Family Law," as specified in DR2-105. True copies of the opinions described above are set forth in Exhibits P and Q attached hereto. Those opinions have not been withdrawn or modified by the Committee or by the Supreme Court of Iowa except as expressly set forth in this Stipulation.

31. Under the Iowa Advertising Rules a lawyer wishing to advertise that the lawyer represents clients or accepts cases involving civil rights claims, whether arising from employment relationships or otherwise, must use the terminology set forth in DR2-105, as interpreted by the Board of Professional Ethics and Conduct. Furthermore, the lawyer must characterize his practice as being limited to this field of law or as practicing primarily in this field of law. Finally, the lawyer must satisfy CLE and other

requirements set forth in the Iowa Advertising Rules and certify compliance with all such requirements.

32. The Continuing Legal Education Commission has interpreted the Iowa Advertising Rules to prohibit lawyers from applying the same CLE hours toward more than one field of law set forth in DR2-105, regardless of whether the training in question relates to two or more such areas. As a result of this interpretation, lawyers must obtain at least 10 hours of CLE for each and every field of law they wish to identify to clients or prospective clients in their advertising, regardless of the similarities or common application of two or more such areas.

33. Since at least 1990 U.S. West has printed the disclaimer "the determination for need . . . " on each page of the Yellow Pages section of its Des Moines telephone directory under the heading of "Attorneys" which contains advertisements smaller than one-half page in size. On those pages containing advertisements for attorneys one-half page in size or larger, no such disclaimers are printed unless contained within a lawyer's display advertisement. U.S. West has never, without a request from an attorney, printed the disclaimer required under DR2-101(C) ("a description or indication of limitation . . . ").

34. In September 1984 the Supreme Court of Iowa took under consideration a proposed plan to establish criteria for lawyers wishing to qualify as specialists in specific fields of law and permitting lawyers to voluntarily satisfy such criteria and certify their specialization in specific fields of law. A true copy of the Order filed September 13, 1984, in In the Matter of a Proposed Plan Pertaining to

Specialization in the Practice of Law, with attachment, is attached hereto as Exhibit R.

35. By Order filed March 15, 1985, in In the Matter of a Proposed Plan Pertaining to Specialization in the Practice of Law, the Supreme Court of Iowa declined to take any action on the specialization proposal and proposed further study of the proposal. A true copy of that Order is attached hereto as Exhibit S.

36. A Report to the Iowa Supreme Court from the Supreme Court Study Committee on Lawyer Specialization was filed with the Iowa Supreme Court on August 5, 1986. This report recommended that the Court establish a voluntary formal program to certify the expertise of lawyers in five fields of law. A true copy of that report is attached hereto as Exhibit T.

37. A true copy of the press release issued by the Iowa Supreme Court on August 6, 1986, describing the Study Committee's report is attached hereto as Exhibit U.

38. By order filed November 7, 1986, in In the Matter of a Report to the Iowa Supreme Court from the Supreme Court Study Committee on Lawyer Certification, the Supreme Court of Iowa declined to take any further action on the Study Committee's proposal. A true copy of the order if [sic] attached hereto as Exhibit V.

39. A true copy of The President's Letter printed in the June/July 1985 issue of The News Bulletin, published by the Iowa State Bar Association is attached hereto as Exhibit W.

40. Except as described herein and in Formal Opinions 89-55 and 90-39, neither the Supreme Court of Iowa nor

any of its committees or boards has ever considered or approved any proposal establishing criteria for lawyers specializing in any specific field of law. True copies of these opinions are attached hereto as Exhibits X and Y.

41. On or about January 3, 1995, Respondent filed with the Iowa Supreme Court Commission on Continuing Legal Education an Attorney's Report of Compliance with Eligibility Requirements Concerning Description of Indication of Limitation of Practice pursuant to DR2-105(A)(4). A true copy of that report is attached hereto as Exhibit Z.

42. Respondent incurred CLE registration fees of $1,320 in order to obtain the CLE hours listed in Exhibit Z. This amount does not include tuition for the June 1994 IWCAC Workers Compensation Symposium. Respondent's tuition for that seminar was waived because he was a member of the Program Committee and gave a presentation at the Symposium at the request of the Committee. This amount does not include travel expenses incurred by Respondent in connection with travel to one of the CLE seminars which took place in Washington, D.C.

43. On or about June 4, 1996, Respondent filed with the Iowa Supreme Court Commission on Continuing Legal Education an Attorney's Report of Compliance with Eligibility Requirements Concerning Description of Indication of Limitation of Practice pursuant to DR2-105(A)(4). A true copy of that report is attached hereto as Exhibit AA.

44. Respondent or his firm incurred CLE registration fees of $1,094 in order to obtain the CLE hours listed on Exhibit AA. This amount does not include tuition for the February 1995 ITLA Workers Compensation Symposium.

Respondent's tuition for that seminar was waived because he gave a presentation at the request of the program committee. This amount does not include travel expenses incurred by Respondent in connection with travel to one of the CLE seminars which took place in Minneapolis, Minnesota.

45. Attached hereto as Exhibit BB are true copies of the Yellow Page listings under the Attorney heading contained in the Des Moines telephone directory published by U.S. West in November 1995.

46. Attached hereto as Exhibit CC are true copies of the Yellow Page listings under the Attorney heading contained in the Des Moines telephone directory published by U.S. West in November 1996.

47. Attached hereto as Exhibit DD is a true copy of "Iowa Attorney Disciplinary Report – 1995" published in the July 1996 edition of *The Iowa Lawyer*.

48. In support of his contentions that the Iowa Advertising Rules violate his rights arising under the First, Fifth and Fourteenth Amendments of the Constitution of the United States of America and arising under Article I of the Constitution of the State of Iowa, Respondent additionally relies upon the findings, opinions and conclusions set forth in the following documents:

a. Lawyer Advertising at the Crossroads: Professional Policy Considerations, American Bar Association Commission on Advertising (1995);

b. An Empirical Examination of the Iowa Bar's Approach to Regulating Lawyer Advertising, 77 Iowa Law Review 179 (1991).

49. In support of its contentions and in response to Respondent's constitutional arguments, Complainant additionally relies upon the findings, opinions and conclusions set forth in various court decisions (to be cited in its brief) and in the following documents, copies of which are attached hereto:

a. Loosening the Glue: Lawyering Advertising, Solicitation and Commercialism in 1995, 9 Georgetown Journal of Legal Ethics 287 (1995);

b. Remarks of Retired Chief Justice W. Ward Reynoldson before the National Conference of Bar Presidents, August 6, 1988.

Respectfully submitted,

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IN THE SUPREME COURT OF IOWA

NO. 97-773

THE IOWA SUPREME COURT
BOARD OF PROFESSIONAL
ETHICS AND CONDUCT

Complainant-Appellee,

vs.

KEVIN M. KIRLIN,

Respondent-Apppellant.

APPEAL FROM THE GRIEVANCE COMMISSION
OF THE SUPREME COURT OF IOWA

APPELLANT'S REPLY BRIEF AND ARGUMENT

(Filed Sep. 15, 1997)

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The rules go on to specify that lawyers may only describe specific areas of practice by using nouns and

adjectives previously approved by this Court. DR2-105(A). The rules prevent lawyers from describing specific areas of practice unless the lawyers characterize their practice as limited to those areas or as practicing primarily in those areas. *Id.* The Board confesses that it is "difficult . . . to determine precisely how many areas of law a particular lawyer should be allowed to advertise." Complainant's Brief p. 27. The Board concludes that Iowa rules are "liberal" in allowing a lawyer to list up to three areas. Finally, the Board argues that *In the Matter of R.M.J.*, 455 U.S. 191, 102 S.Ct. 929, 71 L.Ed.2d 64 (1982) does not prevent this Court from limiting the number of areas of practice.

First and foremost, DR2-105 does not merely limit the number of areas of practice which a lawyer may identify in advertising his services. It limits the number of nouns and adjectives a lawyer may use to describe the area of law in which he practices and treats each noun and adjective as a separate "area of practice" whether or not it relates to the same field of law. It dictates precisely which nouns and adjectives are permissible and it prohibits use of any other nouns or adjectives to describe the lawyer's areas of practice or the nature of the lawyer's practice in those areas. It requires lawyers to obtain additional training and certify experience separately for each noun or adjective used, regardless of whether they relate to the same "area of practice."

Under DR2-105 Kirlin is prohibited from making the truthful statements that he represents employees and employers in connection with unemployment benefit

claims, wage and hour claims, Family and Medical Leave Act claims; he represents victims of employment discrimination, race discrimination, sexual discrimination, age discrimination, or disability discrimination; he represents workers injured on the job; he represents workers wrongfully discharged or terminated by their employers; he represents workers fired for seeking workers compensation or other benefits to which they are entitled by law; he represents workers denied adequate representation by unions on grievances; he represents persons with defamation claims; he represents persons suffering bodily injury, including motor vehicle accident victims; and he represents persons charged with crimes.

Under DR2-105, the above statements constitute a listing of approximately 18 areas of practice. None of the above statements is permissible under DR2-105. Accordingly, use of the language set forth in the prior paragraph under DR2-105 would constitute "misconduct" and "advertising abuses" which "reflect adversely on the judicial system and the administration of justice," according to the Board. Complainant's Brief p. 18. Kirlin could use up to three of the following approved "areas of practice" descriptions to describe some of the above activities; Criminal Law, (Job) Discrimination and Civil Rights Law, Employment Law, Labor Law, or Workers Compensation Law. Of course, Kirlin must purchase and attend ten additional hours of CLE training and certify separate training and experience for each authorized description of an "area of practice."

It is patently clear that this scheme is not a "narrowly drawn measure" which directly advances a legitimate governmental interest. It is, in fact, the most restrictive

regulatory scheme governing legal advertising in the United States of America. "An Empirical Examination of the Iowa Bar's Approach to Regulating Lawyer Advertising," 77 Iowa L.Rev. at 202.

Citing *Committee on Professional Ethics & Conduct v. Humphrey*, 355 N.W.2d 565 (Iowa 1984), *on remand*, 377 N.W.2d 643 (1985), *dismissed for want of a substantial federal question*, 475 U.S. 1114, 106 S.Ct. 1626, 90 L.Ed.2d 174, *rehearing denied*, 476 U.S. 1165, 106 S.Ct. 2293, 90 L.Ed.2d 734 (1986), the Board argues that this Court's regulatory scheme encompasses the "safe harbor" concept by identifying allowable language and affording lawyers the opportunity to add more "areas of practice" to the list or the theoretical opportunity to petition this Court for more substantive revisions of the advertising rules. Complainant's Brief p. 29.

In *R.M.J.*, the U.S. Supreme Court observed that the Missouri advertising rule in question " . . . on its face . . . would appear to suggest that the specific provisions are intended only to provide a safe harbor, *and not to prohibit all other forms of advertising or categories of information.*" However, the state court agency charged attorney R.M.J. with listing areas of law in advertising not approved by the state and which failed to include the required disclaimers and the federal court found that the state interpreted the rule to ban constitutionally permissible speech. *R.M.J.*, 455 U.S. at 194, fn. 4 and accompanying text, 102 S.Ct. at ___, 71 L.Ed.2d at 68-69.

It is abundantly clear from *R.M.J.* that a "safe harbor" does not attempt to prohibit all forms of advertising or categories of information other than those explicitly

authorized by the state regulation. It is true, as the Board suggest, that Iowa's advertising rules are different that the Missouri rules invalidated in *R.M.J.* The Iowa rules are far more extreme in outlawing constitutionally protected speech than anything envisioned by the Missouri Supreme Court. Petitioning this Court to add additional "areas of practice" to the list of authorized nouns and adjectives will not cure a regulatory scheme whose principal premise is constitutionally flawed.

It is time to acknowledge that DR2-101 and DR2-105 are far afield from the regulation of broadcast advertising upheld in *Humphrey*. Characterizing such rules as a "safe harbor" or as "liberal" would be humorous if it were not used to justify a serious and systematic effort to deprive Iowa lawyers and legal consumers of rights secured to them by both state and federal law. The reality is that DR2-101 and DR2-105 create a linguistic and regulatory "gulag" confining ethical and competent lawyers and preventing any communication between lawyer and layperson in plain and truthful language.

In that "gulag," the state must approve, prior to any communication, *all* language used by lawyers to describe their services to citizens in need of legal services, prohibiting as a matter of course the use of truthful statements by lawyers, dictating these of a list of approximately 110 words to describe legal services, compelling the use of numerous duplicative disclaimers warning legal consumers that lawyers who advertising the types of cases they handle possess no expertise, then compelling lawyers who list such areas to obtain and certify additional training and experience prior to making any communication to the public.

The regulations governing advertising adopted by this Court in 1989 and which remain in effect to this date, plainly prohibit a wide variety of protected speech under the pretense that they protect legal consumers from potentially misleading speech. Respondent has established that the assumptions underlying these regulations were unsound to being with. The Board had failed to identify any legitimate governmental interest served by these regulations. No other pervasive scheme of content-based regulations and prior restraints has been found constitutionally valid under federal First Amendment jurisprudence. Accordingly, this Court must acknowledge that the adverting rules challenge here are constitutionally defective.

* * *

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Iowa Assn. of Workers Compensation Lawyers, Inc.
Iowa State Bar Association
Labor & Employment Law Section
Workers Compensation Section
Litigation Section

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Supreme Court, U.S.
FILED
MAR 27 1998
CLERK

No. 97-1406

In The

Supreme Court of the United States

October Term, 1997

KEVIN M. KIRLIN,

Petitioner,

vs.

IOWA SUPREME COURT BOARD OF PROFESSIONAL ETHICS & CONDUCT,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Iowa

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Whether Petitioner, an Iowa lawyer who has been disciplined for violation of certain ethics rules concerning lawyer advertising, has standing to assert a First Amendment challenge to other advertising restrictions that were not involved in the charges and discipline below.

2. Whether a limited restriction on a lawyer's eligibility to advertise his or her practice in particular areas of the law, which is designed to protect the public from misleading or potentially misleading advertisements, warrants review by this Court in light of the record made below.

3. Whether Petitioner has shown a compelling reason for this Court to review the Iowa court's determination that it is reasonable and constitutional to require lawyers who advertise their membership in professional associations to include a disclaimer in their advertisements.

4. Whether Petitioner has properly presented a question for this Court's review with respect to a restriction on the number of areas of practice that may be listed in a lawyer's advertisement, and, if so, whether he has shown a compelling reason for this Court to review the Iowa court's determination that the numerical restriction is reasonable and constitutional.

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STATEMENT OF JURISDICTION

Petitioner has failed to show jurisdiction in this Court with respect to all of the questions he presents for review. In particular, there is no case or controversy here with respect to Petitioner's attacks on a provision in Iowa Code of Professional Responsibility for Lawyers DR 2-105(A)(2), which specifies particular areas of the law that may be mentioned in advertisements, and a provision in DR 2-105(A)(3), which specifies prefatory language for listing areas of practice.

Petitioner's assertion that the Board *charged* him with "listing a field of practice in the November 1994 directory which was not approved by the Supreme Court of Iowa" (Pet. i) is a misrepresentation. The Supreme Court of Iowa correctly summarized the charges against Petitioner as follows: "The [Board] alleges that (1) he failed to comply with [practice and training] rules requiring information to be filed, prior to advertising, with our Commission on Continuing Legal Education, (2) he failed to include cautionary statements in his ads, and (3) he listed more than the three areas of practice permitted by the rules." (Pet. App. 2.) The Board did not charge Petitioner with advertising practice in a field that was not approved. (See Complaint, App. below 1-3.)

Nor is it accurate to suggest, as Petitioner does, that the Iowa court *disciplined* him for listing a field of practice which was not approved. (Pet. i.)

Consequently, there is no case or controversy here regarding the area of practice descriptions specified in DR 2-105(A)(2). Stated differently, Petitioner lacks standing to challenge a provision that was not involved in the

charges against him. Fundamental principles of standing include the recognition that "constitutional rights are personal and may not be asserted vicariously" and that "under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." *Broadrick v. Oklahoma*, 413 U.S. 601, 610-11, 93 S.Ct. 2908, 2915, 37 L.Ed.2d 830, 839 (1973). "Constitutional judgments . . . are justified only out of the necessity of adjudicating rights in particular cases between the litigants brought before the Court[.]" *Id.* at 611, 93 S.Ct. at 2915, 37 L.Ed.2d at 839.

Petitioner presumably will rely here, as he did below, on an exception to traditional standing principles in the area of the First Amendment, allowing litigants to challenge a restriction on speech "not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *See Broadrick, id.* at 612, 93 S.Ct. at 2916, 37 L.Ed.2d at 840.

This Court has made clear, however, that the First Amendment standing exception does not apply to *commercial* speech, and, in particular, to professional advertising. In *Bates v. State Bar of Arizona*, 433 U.S. 350, 380-81, 97 S.Ct. 2691, 2707-08, 53 L.Ed.2d 810, 834 (1977) and *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 462 n. 20, 98 S.Ct. 1912, 1922 n. 20, 56 L.Ed.2d 444, 457-58 n. 20 (1978), the Court noted that commercial speech is more hardy than other forms of speech and does not need surrogate litigators.

Petitioner similarly lacks standing to challenge a provision in Iowa Code of Professional Responsibility for Lawyers DR 2-105(A)(3), which states that the listing of a practice area in an advertisement shall be preceded by the words "practice limited to" or "practicing primarily in." As Petitioner notes, the Iowa court did not address his challenge to DR 2-105(A)(3). (Pet. 16.) The court had no reason to. Petitioner was not charged with violating this rule. Therefore, no case or controversy is present with respect to DR 2-105(A)(3) and Petitioner lacks standing to challenge its constitutionality in this Court. *See Street v. New York*, 394 U.S. 576, 581-82, 89 S.Ct. 1354, 1360, 22 L.Ed.2d 572, 579 (1969) (standing requires that question was presented to lower court in such manner that it was necessarily decided by that court).

Finally, this is not a case where Petitioner can claim standing with respect to matters not involved in the charges on the ground that he would be unable to assert his claims without violating the rules and facing discipline. The Iowa Supreme Court has provided a safe harbor administrative procedure for lawyers in Petitioner's situation. One who wishes to challenge or change the advertising rules may request that the Board recommend changes to the Iowa Supreme Court. If the Board rejects the request, the lawyer may take exception thereto, in which case the matter is forwarded to the Iowa Supreme Court for its determination. Ethics and Conduct Rule 5.1 *et seq.* (Resp. App. 1.) *See Iowa Supreme Court Board of Prof'l Ethics & Conduct v. Wherry*, 569 N.W.2d 822, 827 (Iowa 1997), *cert. denied*, ___ U.S. ___ (No. 97-1200, Mar. 23, 1998). Petitioner has had the right to utilize this procedure but has elected not to do so. (Pet. App. 16.) He

does not have standing to obtain review of questions he has elected not to present properly to the court below.

In short, Petitioner has standing to challenge only those portions of the advertising rules for which he was disciplined.

STATEMENT OF THE CASE

This case arises from a disciplinary action brought against Petitioner by the Board, alleging specific violations of the Iowa Code of Professional Responsibility for Lawyers. Contrary to Petitioner's suggestion, the Iowa Supreme Court in deciding the case did not resolve the constitutionality of Iowa's lawyer advertising rules in general. The Iowa court considered and determined the constitutionality of only those provisions of the rules that were implicated in the charges against Petitioner. (Opinion, Pet. App. 1-10.)

The general factual background is uncomplicated and is summarized in the opinion of the Iowa Supreme Court. (Pet. App. 2).

Petitioner's characterization of the Iowa advertising rules in general as "abolitionist" (Pet. 24-25) is hyperbole. Petitioner use of the term comes from a passage in an American Bar Association study which, in context, focused largely on electronic media advertising. ABA Commission on Advertising *Lawyer Advertising at the Crossroads* 106 (1995). The Iowa rule governing electronic media advertisements is not at issue here. With respect to

print media, any claim that the Iowa rules are "abolitionist" is belied by Petitioner's own offer into evidence of page after page of lawyer advertisements from an Iowa telephone directory. (Ex. BB and CC below.)

Petitioner's assertion that it is "certain" that Iowa's rules have "a profoundly chilling effect on the use of advertising by Iowa lawyers" is likewise unwarranted. (Pet. 22.) The only evidence he cites in support of this "certainty" is a survey, with conclusions by two law students, comparing advertising by Iowa and Wisconsin lawyers. Jim Rossi & Mollie Weighner, *An Empirical Examination of the Iowa Bar's Approach to Regulating Lawyer Advertising*, 77 Iowa L. Rev. 179 (1991). Like the ABA study, the law review article's conclusions are not specific to the particular rules involved here. Moreover, the objective findings reported in the article prove only that Iowa lawyers' attitudes toward advertising differ from those of Wisconsin lawyers. The survey results showed that only about twenty-five percent of lawyers in Iowa believe lawyer advertising is in the best interests of the public and fewer than twenty percent believe it is in the best interests of the legal profession. *Id.* at 247-48. Unlike Wisconsin lawyers, a majority of Iowa lawyers say they would not advertise even if convinced that advertising would increase the volume of their legal business. *Id.* at 248. The Iowa lawyers in the survey were not asked whether the state's advertising rules discouraged them from advertising. *See id.* at 259-68 (attorney questionnaire).

Even the most restrictive of the rules violated by Petitioner – the rule requiring that a lawyer meet eligibility requirements before advertising areas of practice –

is in no way a *ban* on such advertising. In fact, the number of Iowa lawyers who have qualified to place such ads has grown annually (from 96 in 1986 to 527 in 1996). (App. below 34.)

REASONS FOR DENYING THE WRIT

I. Petitioner lacks standing to challenge the constitutionality of provisions of the Iowa lawyer advertising rules that were not implicated in the charges against him.

For the reasons discussed above in the Statement of Jurisdiction, Petitioner lacks standing to assert a constitutional challenge to provisions of rules governing the terminology under which areas of practice may be advertised by lawyers and requiring that an area of practice listing be preceded by the words "practicing primarily in" or "practice limited to." *See* Iowa Code of Professional Responsibility for Lawyers DR 2-105(A)(2) and (3). (Pet. 5-7). Petitioner was not charged by the Board with violating these provisions, nor was he disciplined for any such violations. Thus, there is no compelling reason, let alone jurisdiction, for this Court to consider these matters.

II. The limited restriction on a lawyer's eligibility to advertise practice in particular areas of law is reasonable under the First Amendment and does not warrant this Court's review.

Petitioner contends that his First Amendment rights have been infringed by the requirement that a lawyer

meet certain practice and education requirements – and so certify to the Continuing Legal Education Commission of the Iowa Supreme Court – before advertising practice in a particular area of the law. *See* DR 2-105(A)(4). (Pet. 8-9.)

On March 23, 1998, this Court denied certiorari in a case involving the same constitutional challenge to the eligibility requirements of DR 2-105(A)(4) raised by Petitioner herein. *See Iowa Supreme Court Board of Professional Ethics & Conduct v. Wherry*, 569 N.W.2d 822 (Iowa 1997), *cert. denied*, ___ U.S. ___ (No. 97-1200, Mar. 23, 1998). As in *Wherry*, there is no compelling reason for this Court to review the Iowa court's decision with respect to the constitutionality of DR 2-105(A)(4).

The rule is designed to protect the public interest in informed (as opposed to misinformed) selection of counsel. *See Wherry*, 569 N.W.2d at 825. The record below shows that the rule reasonably fits this interest.

A review of Iowa's advertising rules in 1988 included the finding by a special master (based largely on a survey of consumers) that "the public, in relying on listings of fields of practice, assumes that the attorney has additional education and expertise in the advertised field of practice." (App. below 79-80, 105.) The Iowa court adopted DR 2-105(A)(4) "in the hope it would bring a measure of reality to this assumption." *Wherry*, 569 N.W.2d at 826.

The result of misinformed selection of counsel based on an area of practice advertisement is shown by *Committee on Prof'l Ethics & Conduct v. Morris*, 490 N.W.2d 806

(Iowa 1992). Morris was a lawyer who listed "immigration law" in his yellow-page ad. A Canadian national relied on this ad to hire him "to represent her in appealing the denial of her petition to the commissioner of the INS and in obtaining temporary work authorization." *Id.* at 806-07. Morris, however, had not met the eligibility requirements of DR 2-105(A)(4) for listing areas of practice and had little experience in immigration law. 490 N.W.2d at 808. He failed to take the steps necessary to protect his client's interests. As a result, she was arrested while on the job and forced to "voluntarily" leave the country in lieu of deportation. *Id.* at 807.

The Iowa court was not required to find that Petitioner himself provides unsatisfactory representation to those who hire him on the basis of his area of practice advertisements. To uphold a restriction on commercial speech it is unnecessary to prove that the "particular conduct in fact trenched on the interests that the regulation sought to protect" or that "the state interests supporting the rule actually were advanced by applying the rule in [a] particular case." *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 431, 113 S.Ct. 2696, 2706, 125 L.Ed.2d 345, 358 (1993).

Petitioner criticizes the Iowa court's failure to "discuss whether any less burdensome alternatives exist which would remedy the allegedly misleading representations of specialization." (Pet. 22.) In particular, he points to the court's failure to address the efficacy of disclaimers. The evidence below, however, shows that disclaimers are better viewed as a complement than as an alternative to the eligibility requirements. A review of Iowa's advertising rules conducted in 1988 shows that

while most consumers find the disclaimers understandable, many consumers do not bother to read them. (App. below 107.) Disclaimers alone, therefore, cannot be said to eliminate the potential for misinformation in the selection of counsel.

Moreover, a restriction on commercial speech need not be a perfect fit, the best disposition, or the least restrictive means of protecting a governmental interest. *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 480, 109 S.Ct. 3028, 3034-35, 106 L.Ed.2d 388, 403-04 (1989). Under the record made below, the eligibility requirement of DR 2-105(A)(4) is a reasonable step to prevent misinformation and presents no compelling reason for review by this Court.

III. There is no compelling reason for this Court to review the constitutionality of a reasonable disclaimer requirement in lawyer advertisements referring to membership in professional associations.

In his yellow-pages display advertisements, Petitioner prominently publicizes his memberships in various professional associations. (Pet. App. 32, 33.) He challenges the constitutionality of an Iowa rule requiring him to include a disclaimer informing the public that such memberships "do not mean that a lawyer is a specialist or expert in a field of law, nor do they mean that such lawyer is necessarily any more expert or competent than any other lawyer." DR 2-101(C). (Pet. 4.) The disclaimer requirement is reasonable and presents no compelling basis for review by this Court.

This Court has voiced approval of disclosure or disclaimer requirements in lawyer advertising. *See Peel v. Attorney Reg. & Disciplinary Comm'n*, 496 U.S. 91, 110, 110 S.Ct. 2281, 2292, 110 L.Ed.2d 83, 100 (1990) (plurality opinion) (recognizing that state may require disclaimer to counteract potentially misleading ad content); *Bates*, 433 U.S. at 375, 97 S.Ct. at 2704-05, 53 L.Ed.2d at 830 ("preferred remedy" for potentially misleading advertising "is more disclosure, rather than less"). In *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651, 105 S.Ct. 2265, 2282, 85 L.Ed.2d 652, 673 (1985), the Court upheld an Ohio disclosure rule, stating that "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers."

Petitioner claims that the DR 2-101(C) disclaimer is duplicative of other disclaimers. As the Iowa court correctly found, however, "[t]he warnings under DR 2-101(C) and DR 2-101(A) . . . have different purposes. The warning required by DR 2-101(C) cautions the consumer not to give undue weight to membership in associations; DR 2-101(A) warns consumers not to be swayed by advertising in selecting a lawyer." (Opinion, Pet. App. 6.) The concern is that a lawyer will imply expertise merely by joining an organization and listing that organization in his or her advertisement. (Opinion, Pet. App. 7.)

Interestingly, Petitioner has made no claim that his own membership in various associations makes him any more competent in the fields of law in which he practices. *Cf. Peel v. Attorney Disciplinary Comm'n of Illinois*, 496 U.S. 91, 110 S.Ct. 2281, 110 L.Ed.2d 83 (1990) (striking down

prohibition on advertisement of trial advocacy certification based on demonstrated experience, participation in approved programs, and successful completion of examination). He has failed to present a compelling reason why this Court should review his discipline for violation of the disclaimer requirement.

IV. Petitioner has failed to properly present for consideration a challenge to a restriction on the number of areas of practice a lawyer may advertise, and has otherwise failed to show a compelling reason for this Court to review the Iowa court's determination that the limitation is reasonable.

Petitioner was disciplined for violating a provision in DR 2-105(A)(2) limiting to three the number of areas of practice that one lawyer may advertise. Petitioner has not properly presented this matter for review, since he does not mention it in his statement of "Questions Presented." (Pet. i.) *See* Supreme Court Rule 14(1)(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."). Assuming for argument's sake only that he has properly made a request for review, he has failed to explain why this Court should grant it.

The Iowa court correctly found that Petitioner did not develop an argument in support of his challenge to the numerical limitation. (Pet. App. 8.) In disputing this finding, Petitioner refers only to his *reply* brief below, which he includes as an appendix to the Petition. (Pet. 15; Pet. App. 25-31.) As he implicitly admits, he did not develop an argument on this matter in his initial appellate brief to the Iowa court. The reply brief does mention

the limitation in passing (Pet. App. 27, 28), but focuses instead on the terminology specified in DR 2-105(A)(2) for describing areas of practice. The reply brief cannot fairly be said to develop an argument explaining why the numerical limitation should be held unconstitutional. Petitioner should not be allowed to develop his argument for the first time before this Court.

The decision of the Iowa court to limit the number of advertised areas of practice to three is supported by the 1988 Magid study, which found that over seventy percent of consumers surveyed believe "the law today is so complicated that an individual lawyer can specialize in only one or two areas." (App. below 106.) The Iowa court concluded "[t]here is a limit to the number of areas in which an attorney may reasonably claim to concentrate, and we believe that three is reasonable." (Opinion, Pet. App. 8.) Statistics support the Iowa court's conclusion. Of the 527 Iowa lawyers currently meeting the eligibility requirements, over half (280) qualify to list only one area, barely a third (174) list two fields, and fewer than fifteen percent (73) qualify to list three areas. (App. below 34.)

This Court has allowed the states leeway in drawing reasonable lines to regulate professional advertising, even though the lines may not be a perfect fit. *Cf Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 632-33, 115 S.Ct. 2371, 2380, 132 L.Ed.2d 541, 554-55 (1995) (approving 30-day ban on solicitation letters to accident victims as reasonably well-tailored to problem of offensive mailings). Petitioner has failed to demonstrate why this Court should

review the judgment below with respect to the numerical limitation rule.

CONCLUSION

For the above reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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RULES OF PROCEDURE OF THE IOWA SUPREME COURT BOARD OF PROFESSIONAL ETHICS AND CONDUCT

* * *

5.1. Any member of the bar desiring to expand the information authorized for disclosure pursuant to the provisions of DR 2-101 or DR 2-105, Iowa Code of Professional Responsibility for Lawyers, or to provide for its dissemination through forums other than therein authorized or otherwise to change those rules, may apply to the board. Such application shall be made in writing by restricted certified mail, and shall include such documentation as the applicant deems appropriate. The board thereafter shall determine, on the basis of documentation at hand, further investigation, or whatever hearings it deems to be necessary, whether all or any part of the proposal is necessary in the light of existing provisions of the code, accords with the standards of accuracy, reliability, and truthfulness, and would facilitate the process of informed selection of lawyers by potential consumers of legal services. [Court Order May 18, 1978; December 15, 1994, effective January 3, 1995]

5.2. If the board is of the opinion that no relief should be granted in response to any such application and no changes are necessary, it shall make a determination to that effect and then shall proceed as provided hereinafter. [Court Order May 18, 1978; December 15, 1994, effective January 3, 1995]

5.3. If the board concludes that relief should be granted in response to such application, it shall make its determination to that effect and submit the same to the

supreme court by filing the same with the clerk of the court as a recommended amendment to the Iowa Code of Professional Responsibility for Lawyers, universally applicable to all lawyers admitted to practice in Iowa. [Court Order May 18, 1978; December 15, 1994, effective January 3, 1995]

5.4. Within ten days after the board has made its determination under paragraphs 5.1 and 5.2 hereinabove, it shall notify applicant of its determination by furnishing said applicant a copy thereof by restricted certified mail. Applicant shall have 30 days from the date of the said mailing by the board to the applicant to take exception to all or any part of the determination of the board. Said exceptions shall be taken by filing with the board within said thirty-day period, complete written notice and documentation of the exceptions and the reasons therefor, which shall be forwarded to the board by restricted certified mail. [Court Order May 18, 1978; December 15, 1994, effective January 3, 1995]

5.5. Within 30 days from the receipt of the exceptions, the board shall file with the clerk of the court a copy of said exceptions and documentations attached thereto, together with any written response which the board seeks to make to the court together with a certification of its mailing to the applicant a copy of its response to the exceptions, in order that the court may determine the whole matter, with or without hearing, as to the court may appear appropriate and desirable. [Court Order May 18, 1978; December 15, 1994, effective January 3, 1995]